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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 231

ROBERT J. CLEARY, BY HIS FATHER AND NEXT FRIEND, MIKE CLEARY, SR.,

Petitioner,

vs.

INDIANA BEACH, INC., A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Robert J. Cleary, a minor, by his father and next friend, Mike Cleary, Sr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on January 20, 1960.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. 13) is reported at 275 F. 2d 543.

JURISDICTION.

The judgment of the Court of Appeals was entered January 20, 1960 (App. 13), and became final on April 13, 1960, when Robert J. Cleary's petition for rehearing was denied. The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254(1).

QUESTION PRESENTED.

Whether the trial court (U. S. District Court for the Northern District of Indiana, Hammond Division) without prior notice to counsel or the parties, directing the jury to separate at 4:00 A.M., after they had deliberated on their verdict 12 hours, to remain at large nine hours and then reassemble to consider their verdict, offended the Seventh Amendment to the Constitution of the United States.

STATEMENT.

In the words of the Court of Appeals:

> "Plaintiff, while visiting friends at a resort operated by defendant, was seriously and tragically injured when he dived from a pier, maintained in conjunction with defendant's beach, into approximately two and one-half feet of water. He now appeals from an adverse judgment entered by the court below on the jury's verdict finding the issues in defendant's favor in his action for damages for injuries."

The material facts are not in dispute. Indiana Beach, Inc., hereinafter referred to as the "Corporation," operates a summer resort "Playground of the Midwest." The corporation operated for profit on its premises a wide variety of recreational facilities and featured its bathing beach around its 650 foot steel promenade as its "greatest attraction." The nature and extent of the corporation's operations were described in the testimony of its present and general manager. He said that its resort season began May 30th and ended around Labor Day and that he had been managing director since 1946. That in the summer of 1956 there were 50 cottages on the premises available to guests for housekeeping and that it operated a hotel there with 50 rooms with a capacity of 130 to 140 persons. He estimated the occupants of the cottages and hotel av-

eraged about 500 patrons per day. In addition, there were daily visitors who spent several hours there. There was no admission fee to the grounds. However, there was a charge for the use of the beach and each of the other facilities.

The president testified that on some days in July 1956, as many as 2000 persons or guests were on the premises. He said that any of these could use corporation's swimming beach and diving facilities on payment of the regular fee.

The dance hall according to the manager operated every night including Sunday and the dance usually ended between 12:30 and 12:45 A.M. When one of the better known bands played, about 1000 people attended. The pier around the bathing beach was 250 feet from the ball room and the manager testified the beach, pier, and all other facilities operated by corporation "were available to people who went to the dance if they wanted to come out of the dance hall and pay to use them." There were about 60 employees on the combined payrolls of the corporation and its concessionaires in July 1956.

The petitioner was injured when he dived into the water in the enclosure from the North pier near the Northeast corner.

The particular facts, essentially undisputed, prior to and at the time of the accident which gave rise to this suit, are set forth as part of the opinion of the Court below. (App. p. 19.)

At the conclusion of a six day jury trial in the District Court, in which 32 witnesses testified and in which a large number of exhibits were introduced into evidence, the jury retired at about 4:00 P.M. on July 14, 1958. After the jury retired to consider their verdict, the Court told counsel that he would be at the Court House until 10:00 P.M. Petitioner's counsel told the Court that he would be in

Chicago but could be in the courtroom within 30 minutes after notice. Counsel for petitioner left his Chicago address and phone number with an attache of the Court.

The jury returned their verdict at 5:25 P.M., Tuesday, July 15, 1958, 25 hours after the case was given to the Jury. Neither petitioner's nor respondent's counsel were present in Court when the verdict was returned. (256, 264, 265.)

Petitioner's post trial motion to amplify the record stated the case was given to the jury at 4:30 P.M., July 14, that the jury deliberated until 4 A.M., July 15 and at that hour were ordered by the Court (15) to go to their respective homes, return to the Court House at 1 P. M. July 15, and resume deliberations. That the jury separated at 4 A.M. and returned to the Court House at 1 P.M., and resumed consideration of the case. That the jurors were not under the supervision of a sworn officer from 4 A.M., July 15 to 1 P.M. The motion (16) requested that the Trial Judge state into the record his knowledge of the facts in this respect and that the Court order that each of the 12 jurors be summoned into Court so that each could be interrogated under oath about the location and activities of each juror during the interval.

The Court denied that part of the Motion to summon the 12 jurors for such interrogation. On post-trial proceedings (256) the Trial Judge stated that none of counsel for the parties were notified that the jury were to be brought into the court room about 4 A.M., July 15.

At the Court's direction (257) Walter Krause, Chief Deputy Clerk, testified that the Judge, 2 law clerks, the Bailiff and himself were the only persons in the Court Room when the jury were brought in at 4 A.M. Mr. Krause stated his recollection was not clear. He said the Court instructed the jurors to go home after the Court said the

Jury were exhausted and if they got rest they might be able to reach a verdict. That the Court told the jurors when they came back the next day they should not deliberate until all had reassembled and they should not talk to any one while separated. Mr. Krause testified that before the jury first retired to consider their verdict he administered an oath to an officer to supervise the jury.

He said he saw the jury assemble in the Court Room on July 15, at 4 A.M. That the Judge was on the Bench but the Court Reporter was not in the Court Room. He said (260) that he would say a report was made at 4 A.M., by the jury foreman although he could not directly recall. To his knowledge no juror had requested to go home or said anything about their inability to reach a verdict. He further said (262) he saw the jury in their jury room or in the court room when they reconvened at 1 P.M. That he was not in the jury room during deliberations but was in there with some of the jurors after they reconvened around 1 o'clock. That he might have meant to "count noses." He then said in response to the Court's question that he could not recall but later in response to counsel, testified that he saw the jury when they reconvened at 1 P.M., either in the jury box or in the jury deliberating room and that he was in there with them prior to when 12 jurors were present. He knew it was intended for him to see that there was no deliberating commenced prior to the presence of all. He said (263) that he was in the doorway of the jury room and some of them were in there when they came back. That he did not recall any one else in there "other than the jurors" and did not know whether the Marshal Mr. James was there when they reconvened around 1 o'clock. He said the parties or their counsel were not notified that the jury were coming into the court room at 4 A.M.

In reply to the Court's inquiry, Mr. Cassidy, counsel for

petitioner, stated that he was in bed asleep at the Union League Club in Chicago at 4 A.M., and that he had given the Judge's law clerk the telephone number of the Club before he left Hammond July 14. That he called the Judge's clerk by phone the next morning and was advised the jury were still out. That he was in Peoria, Ill., when he first heard the verdict at 6 P.M., July 15. Mr. Schultz, attorney for petitioner (265), said he was at his home in bed in Lafayette, Ind., at 4 A.M. Mr. Schilling, attorney for Respondent, said he was in bed at a Motel in Hammond. At the Court's direction, Lee James, Asst. Marshal, testified that around 3 A.M., the Judge inquired of him—James was the sworn officer in charge of the jury—whether the jury were tired. James inquired of the foreman and was advised the jury wanted to continue for awhile. That later the foreman sent a communication to James (267) around 4 o'clock "that the jury were tired and wanted to consider going home." James told the Judge who was in his Chambers and the Judge ordered the jury into the Court Room where the Judge told the Jury that they needed rest and they could separate and go home but should come back the next day at 1 P.M., not to talk to any one or again start deliberating until all were present.

James repeated (268) the first time the matter came up was when the Judge inquired whether the jury were tired and that caused James to go to the jury room and talk to the foreman. That the foreman then told him that several of the jurors were tired. The Marshal said he was clear "on the fact" (269) that after he talked to the Judge, he, the Marshal, went to the jury and called the foreman out and asked him if they were tired and the foreman said they were tired. James said (269) that he talked to the jury foreman a second time and asked him if the jurors were "still tired" and the foreman said they were "pretty tired" and then James told the Judge and

the jury were brought down. Mr. James testified (270) he did not know whether the foreman said anything to him about the jurors going home before they were brought down. James said he told the jurors the buzzer would sound and they should come down to the Court Room. That the jury took their places in the jury box "and went their separate ways". He next saw the jurors back in the jury room that afternoon and told them they could start deliberating after he was told by the Judge to so instruct the jury. He said he did not know where the jurors went at 4 A.M. That he was a sworn officer and they were under his supervision from 4:30 P.M., July 14, to 4 A.M., July 15, but were not under the supervision of any sworn officer from 4 A.M. to 1 P.M.

The Judge stated into the record at the post-trial hearing (271) that as he recalled the facts they were the same as related by Mr. Krause and Mr. James. That around 3 o'clock he told the Marshal to find out if the jury were tired. The Judge believed that the Marshal reported to the Judge that they wanted to continue. The next thing the Judge remembered was when he was awakened in his Chambers by the Marshal who told him the jury were tired and exhausted. He ordered the jury brought to the court room (272) but the Judge could not recall whether he asked the jury any questions, but that he "might have". The Judge said they were tired and looked tired. He thought he told them that "they had deliberated a long time and needed rest". That they ought to be permitted to go home, to separate and come back the next day. Should not talk to any one and not again resume their deliberations until all had reassembled and he ordered them to go home. (273.)

Thereafter, at about 5:30 P.M. on July 15, 1958, the jury returned its verdict as follows:

"We, the Jury, find for the defendant, by finding both parties negligent."

"July 15th, 1958

ARTHUR P. LIEN,
Foreman."

Judgment entered July 15, 1958, that pursuant to the verdict of the Jury, judgment is now entered for the defendant, that it is entitled to recover its costs.

REASONS FOR GRANTING WRIT.

1. After deliberating more than 12 hours, the jury, without notice to counsel or the parties, was ordered to separate at 4:00 A.M., remain at large for nine hours, reassemble at 1:00 P.M., then kept deliberating an additional 4½ hours until 5:30 P.M. It is petitioner's position that this contravened the 7th Amendment to the U. S. Constitution guaranteeing the right of trial by jury in a civil action as it existed at common law.

It is respectfully submitted that the right of trial by jury guaranteed by this Amendment was a jury trial as that which existed at common law and that the common law provided that after a cause was given to a jury for consideration, they should be kept in seclusion and free from contact and communication with other parties except the sworn officer or bailiff.

So far as petitioner's counsel has been able to determine, this Constitutional question has not been precisely decided by this Court. It requires an interpretation and application of the common law to the pertinent facts here presented. In light of the historical background and American judicial custom, the common law has always been uniformly accepted to mean that a jury should be kept to-

gether under the supervision of a sworn officer after they receive the cause and while considering their verdict. This issue obviously extends beyond the Constitutional right of petitioner in this action because its determination will henceforth prescribe a vital standard in the administration of justice.

It is respectfully submitted that the American people have confidence in and are dedicated to their Courts. That our Judicial Branch—the most important of the three branches of our Government—with a view to life, liberty, property and happiness, has for its greatest source of strength, the confidence of the people and that to preserve that confidence, all processes, particularly jury trials, in the administration of justice should be managed so that there will not even be an appearance that could cause public uneasiness or an erosion of confidence.

In its opinion the Court below in disposing of this question refers to three decisions of this Court as authority, to-wit: *Gasoline Products Co.* v. *Champlin Rfg. Co.*, 283 U. S. 494, *Ex Parte Peterson*, 253 U. S. 300, and *Galloway* v. *U. S.*, 319 U. S. 372. The three cited cases are irrelevant and immaterial to the question here presented. The *Gasoline Products* case referred to the issue of granting a new trial on the question of damages only; *Ex Parte Peterson* involved the employment of an auditor before trial to simplify certain complicated issues for the jury, and in the *Galloway* case, the contention discussed was the power of the Court to take from the jury its verdict either on a Motion for Directed Verdict or on post-trial Motion for Judgment notwithstanding Verdict. Clearly the facts in the cited cases are far afield from the issue raised in the instant cause.

There is no decision by this Court in which it was held that a Trial Judge had the power or discretion to change or revise the common law—as the term is used in the 7th

Amendment to the U. S. Constitution to the extent of ordering a jury to disperse and separate and proceed individually at large in the community after a case had been submitted for its consideration and before it had reached a verdict.

The Court below in its opinion indicated that the Third Circuit Court of Appeals had passed upon the question in *Byrne* v. *Matezak*, 254 F. 2d 525. In the *Byrne* case, however, each juror was called and interrogated on post-trial proceedings—the opportunity for which was denied petitioner in the instant case—and it was clearly established in the *Byrne* case that the dispersal did not cause prejudice.

The only record of this question having come to the attention of this United States Supreme Court is this Court's denial of certiorari in the aforementioned *Byrne* case, which mere denial of itself does not constitute an approval of this unusual practice and departure from the common law. The most that can be said for the *Byrne* case is that it discloses the question is far from settled. At p. 528 of that opinion it is stated:

> "Although little has been written by the Courts which have considered dispersal, no inflexible rule has been permitted to dominate the practice."

The issue that we request this Court to decide is a constitutional question and a decision will be far reaching. To restate the question—May a jury be separated or not after a cause is submitted to it for decision under the mandate of the 7th Amendment to the U. S. Constitution? The common law prohibits such a practice. The Amendment says that the common law shall be adhered to.

In *Dimick* v. *Schiedt*, 293 U. S. 474, this Court said:

> "But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these

rules is not to deal with the common law, qua common law, but to alter the Constitution."

In accord—*Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Root* v. *Railway Co.*, 105 U. S. 189.

The Court below in its opinion makes some reference to waiver of the question by failure to make timely objection. Undoubtedly, respondent, if it files its answer to this petition, will strongly urge that same ground. This argument would necessarily imply that petitioner's counsel should have remained in the court room continuously from 4:30 P. M. July 14, when the case was given to the jury, until 4 A.M. July 15, when the trial judge unexpectedly and without notice to anyone called the jury into the court room and ordered them to disperse. The facts as set forth in the record clearly establish this argument to be so unreasonable and onerous that it should not be considered by this Court in determining whether it will for the first time make decision as to the requirements of constitutional trial by jury. In fact, to argue that these circumstances in such an unforeseen and confused situation constituted a waiver of a precious legal and constitutional right is almost to say that phases in the administration of justice are equivalent to a trick and that a cause should be denied not on merit or constitutional right but in favor of him who is more clever.

It is clear that no rights were waived by any party. Nor was anything done or not done by either counsel, that lulled the opposing party into a false position. To say there was a waiver from any fact is to invoke the ridiculous.

Above and beyond the foregoing, it is suggested that the record clearly shows that it was stipulated that both or either counsel might leave the premises and had every right to expect in the light of what was said, that counsel would be notified and given an opportunity to be in Court if anything unusual occurred.

CONCLUSION.

In the clear light of the great public interest in this question, the importance of jury trial is considered by the founders of our country as such a vital matter of public policy, it is suggested that the question warrants a full hearing and consideration by this Court.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12591. SEPTEMBER TERM, 1959, JANUARY SESSION, 1960.

ROBERT J. CLEARY, by his father and next friend, Mike Cleary Sr., *Plaintiff-Appellant*,
vs.
INDIANA BEACH, INC., a Corporation, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

January 20, 1960.

Before HASTINGS, *Chief Judge*, SCHNACKENBERG, *Circuit Judges*, and MERCER, *District Judge*.

MERCER, *District Judge*. Plaintiff, while visiting friends at a resort operated by defendant, was seriously and tragically injured when he dived from a pier, maintained in conjunction with defendant's beach, into approximately two and one-half feet of water. He now appeals from an adverse judgment entered by the court below on the jury's verdict finding the issues in defendant's favor in his action for damages for injuries.

Plaintiff asserts as error certain rulings by the court on the admission and exclusion of evidence, on instructions to the jury, permitting the jury to separate during the deliberation on their verdict and in the order of the court

denying his motion to amend his complaint which was filed after the verdict. We will consider the last two contentions of error first because if those two contentions are meritorious and would require a reversal of the judgment below, it would be unwise for us to comment extensively upon the evidence which undoubtedly we must do if we consider other errors asserted by plaintiff. *Glasser v. United States*, 315 U. S. 60, 67.

The case was submitted to the jury at approximately 4:30 p. m. on July 14, 1958. After submission of the case to the jury plaintiff's counsel advised the court that he was going to Chicago, but that he could be in court, if needed, within 30 minutes after notice. He left an address and phone number with an official of the court where he could be reached while in Chicago. The jury deliberated until about 4:00 a. m. on July 15th, at which time the trial judge told the jurors to go home, get some rest and come back at 1:00 p. m. of the same day to continue their deliberations. The judge admonished the jury not to talk to anyone about the case while they were separated and not to resume their deliberations until the whole jury had reassembled on the following afternoon. At 1:00 p. m. on July 15, 1958 the jury resumed its deliberations and at about 5:25 the same afternoon rendered its verdict in favor of defendant. While he was still in Chicago, on the morning of the 15th, plaintiff's counsel called Judge Swygert's law clerk at Hammond and was then advised that the jury had been sent home and permitted to separate, but would return at 1:00 p. m. on that day to resume their deliberations. Following that telephone conversation counsel left Chicago and went to Peoria, Illinois.

Plaintiff made no objection to the jury's separation or to its resumption of deliberation after separation. In fact, nothing was done until after the adverse verdict had been returned and received when plaintiff's counsel then moved

to supplement the record with testimony of the Judge and the United States Marshal and other court officials as to the facts surrounding the dispersal of the jury at 4:00 a. m. on July 15.

Plaintiff now contends that the action of the trial judge in permitting the jury to separate and then return and resume deliberation, is a violation of the guarantee of trial by jury contained in the Seventh Amendment to the Constitution of the United States. That contention is not well taken. In *Galloway* v. *United States*, 319 U. S. 372, 388-396, the Court discussed at length the meaning of the Seventh Amendment guarantee of the right of trial by jury as it existed at common law. There it is said that the Seventh Amendment guarantees only the basic concept of trial by jury, not that trial by jury shall forevermore follow common law modes which were themselves constantly changing, and which varied from state to state, and between jurisdictions within the United States and England, at the time of the adoption of the Bill of Rights to the Constitution. The recent case of *Byrne* v. *Matczak*, 3 Cir. 254 F. 2d 525, is pertinent and is factually similar to the case at bar. The case, a wrongful death action, was submitted to the jury at 3:56 p. m. At 10:35 p. m. the jury announced that it had not agreed on a verdict. After admonishing the jury to discuss the case with no one, the trial judge dismissed the jurors for the night. The next morning when the jurors returned, deliberation was resumed. The verdict was returned at 5:11 p. m. on that day. The appellant argued that the procedure was improper and was a denial of the right to trial by jury as guaranteed by the Seventh Amendment. In rejecting those contentions of error, the court said that two points controlled the question of propriety of permitting dispersal:

> "First, that the decision whether to allow dispersal is primarily a matter requiring an exercise of discre-

tion by the district judge, and, second, that reversal is proper only when the judge has acted arbitrarily, or when prejudice is shown to have resulted from the dispersal." 254 F. 2d at 528.

On the question whether dispersal of the jury during deliberation was a violation of rights guaranteed by the Seventh Amendment, the court reviewed several cases, including *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; *Ex Parte Peterson*, 253 U. S. 300, and *Galloway* v. *United States*, 319 U. S. 372, and concluded "that the constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved. * * * In this view, fair new procedures which tend to facilitate proper fact finding, are allowable although not traditional." 254 F. 2d at 528-529.

The control of the jury, and the question whether to allow a jury to separate, while deliberating and reconvene after separation to resume deliberation, is a matter within the sound discretion of the trial court: *Byrne* v. *Matczak*, 3 Cir., 254 F. 2d 525, cert. denied 27 L. W. 3111; *Franklin* v. *Shelton*, 10 Cir., 250 F. 2d 99, cert. denied 355 U. S. 959; *Bratcher* v. *United States*, 4 Cir., 149 F. 2d 742, cert. denied 325 U. S. 885. The trial judge is in a better position than are we to appraise the intangibles determinative of the question whether separation ought to be allowed. He is in position to make an informed guess whether a jury is hopelessly deadlocked, or whether further deliberation is likely to be fruitful and avoid a retrial of a prolonged case. He is also in the position to determine whether deliberation has continued for such a length of time and to such extent that weariness of the jurors is likely to preclude impartial and fruitful deliberation if deliberation is continued without pause. *Cf. Byrne* v. *Matczak*, *supra*, at 529. Absent proof that the judge has acted arbitrarily, or proof that plaintiff was in fact prejudiced by the separation and

reconvening of the jury, the fact of separation can never be a ground for reversal of a judgment. No arbitrariness or prejudice is shown here.

Moreover, the question was not preserved by plaintiff for review. Plaintiff's counsel absented himself from the premises of the court while the jury was deliberating. While court officials were advised where counsel could be reached, and were advised that upon notice counsel could be in court within 30 minutes, nevertheless, it is illogical to assume that a district court must give notice to counsel and then wait 30 minutes for the parties to appear in court before routine communications are had with the deliberating jury. The determination to allow dispersal was made in open court and the judge could properly assume counsel had elected not to be present. Prior to resumption of deliberation, plaintiff's counsel had knowledge that the jury had been dispersed and that the jury was returning later on the same day to resume deliberation in this case. No objection was then made to the dispersal, or to the resumption of deliberation. Instead, counsel took his chances, went on about his business and raised his voice in protest against the procedure for the first time after the verdict was in and the issues had been determined adversely to his client. Under those circumstances, plaintiff is not in position now to complain. *Franklin* v. *Shelton*, 10 Cir., 250 F. 2d 92, cert. denied 344 U. S. 950; *Byrne* v. *Matczak*, 254 F. 2d 525, 528, cert. denied 27 L. W. 3111; *Cf. Maloney* v. *Brandt*, 7 Cir., 123 F. 2d 779, 782; *McComb* v. *Goldblatt Bros.*, 7 Cir., 166 F. 2d 387, 389-390. In the latter case we held that an appellant could not raise in this court contentions of error against procedures followed by the district court in determining whether an injunction should be issued because he had failed to object to the procedures adopted and had acquiesced in the lower court's action. The principle we announced there is equally ap-

plicable to the case at bar. No timely objection was made which would have permitted the trial judge to consider the question of the propriety of his action in permitting the jury to separate. For that reason, also, the judgment is not assailable on the ground that the court permitted dispersal of the jury.

The next contention which we must consider is the contention that the trial court erred in denying plaintiff's motion to amend his complaint after verdict. The complaint sounded on negligence. The case was tried, submitted to the jury, and, by the jury considered on the theory of negligence. After the verdict, plaintiff filed a motion, assertedly on authority of Fed. R. Civ. Proc. 15(b), to amend his complaint to allege that defendant had been guilty of wilful and wanton misconduct. That motion was denied.

We think it indisputable that the action of the trial judge in denying the motion to amend is unassailable. If Rule 15 (b) were applied in the manner in which it is here sought to be used, litigation might never end. We think it obvious that the Rule was not intended to permit a party to amend his pleadings after verdict and thereby upset the verdict by asserting a new theory which was not included in the original pleadings, and upon which the case was not tried.

We have previously approved the principle that Rule 15 (b) cannot be used in the above fashion. *Apex Smelting Co.* v. *Burns*, 7 Cir., 175 F. 2d 978, 981. We there quoted and approved the following language from *Hart* v. *Knox County*, D. C. Tenn., 97 F. Supp. 654, 658:

> "Plaintiffs would shift their ground and try a new theory of recovery. The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won, but to jeopardise and perhaps to overthrow a judgment they have lost. It is

> a prime purpose of (15 (b)) to avoid the necessity of new trials because of procedural irregularities, not to set judgments aside and make new trials necessary. If this latter application of the Rule were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one."

See to same effect, *Trabitham* v. *Canal Ins. Co.*, D.C. Tenn., 117 F. Supp 241, affd., 6 Cir., 220 F. 2d 752.

Since plaintiff did not submit the case for trial on a wilful and wanton theory, he may not now rely, in this court, on a wilful and wanton theory for reversal of the judgment. *Chicago & E. I. R. Co.* v. *Southern Ry. Co.*, 7 Cir., 261 F. 2d 394; *Apex Smelting Co.* v. *Burns*, 7 Cir., 175 F. 2d 978; *Gilbey* v. *Travelers Ins. Co.*, 8 Cir., 248 F. 2d 794; *Green* v. *Dingman*, 8 Cir., 234 F. 2d 547; *Inman-Poulson Lumber Co.* v. *C. I. R.*, 9 Cir., 219 F. 2d 159. Therefore, we do not consider plaintiff's contention that the evidence shows defendant guilty of wilful and wanton misconduct.

Defendant operates a resort area on Lake Shafer on the Tippecanoe River in Indiana. The various facilities of the area are open to the public for hire on a fee basis. The swimming and bathing facilities of the resort with which this case is concerned were divided into three separate units. A U-shaped pier extended eastwardly out from a beach into the lake, enclosing a bathing area of substantial size. A diving tower was situated some 40 feet northerly and westerly from the north leg of the U-shaped pier. To the south and west of the south leg of the pier, defendant maintained an area for swimming which was, like the diving tower, outside the area enclosed by the pier itself. The north leg of the pier extended from the beach approximately 152 feet out into the lake. The pier then curved southward for a distance

of 265 feet, at which point it curved westward 150 feet to the beach. The pier was so constructed that the water of the lake could flow freely beneath it, obstructed only by the piles supporting the pier platform. The pier was lighted for night use and was equipped with benches on which bathers could sit. A life guard was maintained by defendant on the pier each day until approximately 9 o'clock p.m. When the life guard went off duty at that time a sign was posted upon the pier which advised bathers that no life guard was present. At the time plaintiff was injured about 11:00 p.m., there was no life guard on duty, but the signs warning of that fact were prominently displayed on the pier.

On July 31, 1956, plaintiff went to defendant's resort to visit friends. He arrived at the resort in the early evening. After spending some time visiting and looking over the resort facilities, plaintiff and two friends got into their bathing suits and entered the pier through a turnstile at the beach end of the north leg thereof, traversed the north leg of the pier to the northeast corner of the U. There they dived into the water on the inside of the pier and spent several minutes swimming and diving in the enclosure of the pier. They then retraced their steps along the north leg of the pier to a point opposite the diving tower where they entered the water, swam over to the diving tower and spent some time diving. After their stint at the diving tower, plaintiff and his friends then returned to approximately the same spot along the north leg of the pier, climbed onto the pier and left the beach area. The evidence is disputed as to whether other people, and, if any, how many, were swimming or bathing in the enclosure formed by the U-shaped pier at the time the boys were swimming there.

Plaintiff and his friends then went back to the cottage at which plaintiff was visiting and changed from their

swim trunks. Later the same evening plaintiff and the two boys met some girls with whom they were acquainted. A date was made to meet on the pier and go swimming. At about 11:00 p.m. the plaintiff and his two friends entered onto the north leg of the pier where the girls were then waiting for them. Plaintiff ran, or walked at a fast pace, ahead of the other two boys, and, as he neared the place where the girls were waiting, he dived off the pier into the water in the enclosure. At that point the water was about two and one-half feet deep. Plaintiff's head struck the bottom of the lake, fracturing the vertebrae in his neck. As a result of that injury plaintiff is permanently paralyzed from the neck down.

The day of the accident was plaintiff's first visit to defendant's resort. Plaintiff was 18 years of age at the time of the accident. He was an experienced swimmer and diver. He testified that he had swam and dived in various swimming pools, rivers and lakes. Plaintiff testified that he had not seen anyone dive off the pier at any point except at the northeast corner of the structure where he and his friends had dived earlier the same day. He further testified that he had not been in the water in the pier enclosure at any place other than at the northeast and east end of the enclosure where he and his friends had dived and swam that same evening. Plaintiff had not previously been in the water of the enclosure at the point at which he dived to his injury, and he had made no inquiry or investigation as to depth of the water at that point before he dived. He testified that he could not tell how deep the water was just by looking at it.

Defendant introduced in evidence several signs which had been displayed on its premises on the day of the accident. These included identical signs which had hung near the entrance to each the north and south legs of the pier, each of which contained the following legends: "Notice,

Be Safe; Do not Run on or Dive off of Pier, Wrestle or Push Others; Use Diving Boards with Caution; Do not Dive Until You Have Investigated Depth of Water; Don't Hang on Underneath Merry-Go-Round; Don't Swim Outside of or Underneath Pier". On the steps of the diving tower, a sign had hung which contained the following, among other, language: "Be Careful! Investigate Depth of Water Before You Dive". Introduced also was the sign which had warned that there was no life guard on duty.

Each of the above signs were displayed on defendant's premises on the day of plaintiff's injury. There was some testimony that, on said date, some letters of the sign which hung near the entrance to the north leg of the pier were faded but there was also testimony which tended to prove that the sign was in readable condition, brightly illuminated and clearly visible at night.

We think it clear that the case was properly submitted to the jury. Actually, the contentions against the sufficiency of the evidence to support the verdict rest, in part, upon the wording of the verdict itself. The case was submitted for a general verdict. Neither a special verdict nor special interrogatories were requested by either party. The jury returned a verdict in the following language: "We, the Jury, Find for the Defendant by finding both Parties negligent." On the strength of that verdict, plaintiff now argues that the jury found defendant guilty of negligence and that a new trial should have been granted because there was not sufficient evidence upon which the jury could find that plaintiff was contributorily negligent.

We might dispose of that contention by treating all language of the verdict other than the finding of the issues for defendant as surplusage, since gratis comments by a jury of the reasoning which led it to its general verdict are unnecessary to the jury's function of deciding the issues of the case.

We do not base our decision upon that ground, however. When the evidence is considered most favorably to defendant, as we must now consider it, the jury may well have found plaintiff to have been contributorily negligent. Thus: we think the jury could have concluded that plaintiff had been sufficiently warned of the dangers inherent in diving from the pier without first investigating the depth of the water, or, the jury could have found that plaintiff knew, or in the exercise of reasonable care should have known, that the water at the point at which he dived was too shallow for diving. While it is true that it was defendant's burden to prove contributory negligence, *Robertson Bros. Dept. Store* v. *Stanley*, 228 Ind. 372, 380, 90 N. E. 2d 809, 812, that burden may be sustained by inferences on the whole of the evidence. It is not necessary that such proof rest wholly on positive testimony by defense witnesses. No purpose would be served by summarizing the evidence in greater detail than we have heretofore done. Suffice it to state that we have reviewed the whole transcript of the evidence and we are convinced that there is sufficient evidence upon which the jury could have found that plaintiff was contributorily negligent.

Plaintiff can find little comfort in the cases upon which he relies to support his arguments on this phase of the case. Indeed, plaintiff's argument is close to a contention that defendant was an absolute insurer of plaintiff's safety at the time of his injury. That is an erroneous contention. The measure of the reciprocal duties and rights between the operator of a resort facility and a paying patron of that facility is defined in *Johnson* v. *Hot Springs Land & Imp. Co.*, 76 Ore. 333, 148 Pac. 1137, 1139, in the following language:

> "Where a person * * * provides accommodations of a public nature, that person is required to use

reasonable care and diligence in furnishing and maintaining such accommodations in a reasonably safe condition for the purposes for which they are apparently designed and to which they are adapted. If for any reason the accommodations are not reasonably safe and suitable for the purposes for which they are ordinarily used in the customary way, then the public should be excluded entirely, or appropriate notice of the unsafe and unsuitable condition should be given and persons warned of the dangers in using them. The springboard and the water beneath it constituted the accommodations which the defendant furnished to the deceased, who was a patron for hire, and, as such, was using them for diving purposes to which they were adapted and in a way in which they were customarily used. Persons patronizing the natatorium have a right to assume that the defendant has performed its duty, and that reasonably safe and suitable accommodations have been furnished: * * * If by reason of the shallowness of the water the springboard and the water beneath it were not reasonably safe for diving, then it was the duty of defendant to warn Arthur Johnson of the unsafe condition in order that he might be made aware of the danger; and therefore, if defendant failed to perform its duty, it was guilty of negligence which would be actionable if proximately causing the injury, unless the deceased was himself chargeable with contributory negligence. * * *

"* * * If the defendant had, in fact, cautioned Johnson against the peril, and, notwithstanding such warning, the latter dived off the springboard, then, on the facts in the instant case, the defendant would not be liable because of the knowledge imparted to Johnson; and so, too, the same result follows if Johnson did, in fact, know of the danger, even though not told by the defendant. If, with knowledge of the danger, Johnson placed himself in peril, and, on account thereof was injured, he was chargeable with contributory negligence."

The court then held that the evidence was sufficient to show, as a matter of law, that Johnson had notice of the danger and affirmed a judgment of nonsuit against him.

The other cases relied upon by plaintiff recite and follow the same principles as applicable to a situation wherein injury is occasioned by a dive or plunge into shallow water. *Lake Brady Co.* v. *Krutel*, 123 Ohio St. 570, 176 N. E. 226; *Waddell's Adm'r* v. *Brashear*, 257 Ky. 390, 78 S. W. 2d 31; *Louisville Water Co.* v. *Bowers*, 251 Ky. 71, 64 S. W. 2d 444; *Blanchette* v. *Union Street Ry. Co.*, 248 Mass. 407, 143 N. E. 310. To the same effect are, *Adams* v. *Schneider*, 71 Ind. App. 249, 124 N. E. 718; *Valentine Co.* v. *Sloan*, 53 Ind. App. 69, 101 N. E. 102.

Moreover, the cases cited by plaintiff are factually distinguishable from the case at bar. In each of the *Johnson*, *Lake Brady*, *Blanchette* and *Waddell* cases, the injured plaintiff dived or plunged into the water from a springboard, chute or rope swing maintained by the respective defendants for diving, or plunging, purposes, and the water beneath the diving structure was too shallow for safe use. In the *Bowers* case the plaintiff dived into a swimming pool at a point marked to show a depth of water of five feet, whereas the pool contained no more than two feet of water at the point where the plaintiff dived. Furthermore, in each of those cases, except *Johnson* where a nonsuit was affirmed, the holding was that the case was properly submitted to the jury on the questions of negligence and contributory negligence. To same effect, *Adams* v. *Schneider*, 71 Ind. App. 249, 124 N. E. 718; *Valentine Co.* v. *Sloan*, 53 Ind. App. 69, 101 N. E. 102.

Here we have an injury sustained in a dive from a pier; no springboards were there installed; a sign warned plaintiff, and others, not to dive from the pier; the accident occurred on a lake beach which, unlike a swimming pool, could reasonably be anticipated to contain waters of vary-

ing depths; and plaintiff admitted that he had made no investigation of water depth before he had dived. Also, here, plaintiff's testimony touching the issue of his knowledge, and that of certain other occurrence witnesses called by plaintiff was, in part, contradicted on cross-examination on the basis of statements made by the several witnesses in pre-trial depositions. The case was properly submitted to the jury, and we cannot disturb the judgment entered on the jury's verdict.

Plaintiff complains that the trial judge permitted defendant to introduce in evidence certain photographs during the course of cross-examination of one of plaintiff's witnesses. There was no error in that ruling. The witness identified each of the photographs as a photograph taken by him and his father at, or near, the scene of the plaintiff's injury on the morning following that occurrence. It was within the realm of the court's discretion to permit the introduction of such evidence during cross-examination of an adverse witness.

After plaintiff had testified on direct and cross-examination, the court admitted in evidence, and permitted defendant to read to the jury, portions of plaintiff's pre-trial deposition. That ruling was not error but was in accordance with the provisions of Fed. R. Civ. Proc. 26 (d) (2), which permits the deposition of a party to be used by an adverse party for any purpose.

Finally, plaintiff assigns as error, the court's ruling on the giving and refusal of tendered instructions. We have reviewed the court's charge to the jury and we conclude that it was fair to both parties to the litigation. Particularly, the jury was correctly charged on the law applicable to the issues of negligence and contributory negligence which was applicable to this case.

We find no error in the trial of this cause. Other contentions of error asserted by plaintiff have been considered along with our review of the whole record. We find each to be without merit.

The judgment is affirmed.

APPENDIX B.

Constitution of the United States.

AMENDMENT (VII).

—In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 231

ROBERT J. CLEARY, BY HIS FATHER AND NEXT FRIEND, MIKE CLEARY, SR.,

Petitioner,

vs.

INDIANA BEACH, INC., A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Indiana Beach, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

QUESTIONS PRESENTED.

After a long period of deliberation by a jury in a diversity action for damages for personal injuries the federal trial court, in the absence of and without specific notice to the parties or counsel, permitted the jury to separate and disperse, in order to rest before continuing its deliberations. The jury was admonished not to talk to any one

about the case while separated and not to resume deliberations until the whole jury had reassembled. Petitioner's counsel learned of this procedure while the jury was separated and before it reassembled to continue its deliberations. He made no objection to the separation or to the resumption of the deliberations or to the returning of a verdict by the jury until a week after the verdict was returned, at which time he asserted in an Alternative Motion for a New Trial that the separation of the jury violated the trial by jury guaranteed by the Seventh Amendment to the Federal Constitution.

The questions presented are:

(1) Whether Petitioner properly raised and preserved the constitutional question for review.

(2) If so, whether in a civil action a federal trial court may, in its discretion, permit a jury to separate and rest and then resume its deliberations consistent with the Seventh Amendment, under circumstances where there is no claim or showing of prejudice to either party by reason thereof and no showing that the court acted arbitrarily in so doing.

STATEMENT.

Respondent adds to Petitioner's statement the following:

(1) Petitioner's counsel had actual knowledge before noon on July 15, 1958 (the day the verdict was returned) that the trial court had permitted the jury to separate at 4:00 o'clock that morning and that the jury was to resume its deliberations. (Appendix, pages 265 and 266.)

(2) Despite this knowledge and although having ample time and opportunity so to do, Petitioner's counsel made no objection to the separation of the jury, or to the resumption of the deliberations of the jury, or to the returning of a verdict by the jury.

(3) Petitioner's first objection to the separation was made a week after the verdict was returned in Petitioner's Alternative Motion for a New Trial wherein it was claimed for the first and only time that the separation of the jury offended the guarantee of the Seventh Amendment.

(4) Petitioner made no claim in his Alternative Motion for a New Trial, or otherwise, and offered no evidence to the effect that either party was prejudiced by the separation of the jury. Petitioner made no claim in the Court of Appeals and makes no claim in this Court of any such prejudice. Petitioner made no showing below that the trial court acted arbitrarily in permitting the jury to separate.

ARGUMENT.

The Court of Appeals held that there was no constitutional violation and, moreover, that Petitioner had not properly preserved for review the question of the alleged violation of the constitutional right to jury trial. As to the latter point, the record is clear and undisputed and the decision is supported by ample authority and good reason. Petitioner's counsel had full knowledge of the separation of the jury. He deliberately chose to make no objection to this procedure until after the verdict. Typical of the many cases holding that such knowledge and conduct precludes one from making a subsequent complaint is *Frances v. Southern Pacific Company*, 68 S. Ct. 611, 333 U. S. 445, 92 L. Ed. 798 (1948) in which petitioner contended for the first time in a motion for a new trial that he had been denied jury trial because of the improper selection of the jury panel. The Supreme Court refused to consider the merits of this contention and said with reference to the objection:

> "If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late."

The reason underlying the requirement that procedural objections as well as other objections be timely made is that the trial judge should have an opportunity to consider and, if necessary, correct the action complained of. Thus, the Court of Appeals in the instant case properly held that since no timely objection was made so as to permit the trial judge to consider the question of the propriety of his action in permitting the jury to separate, the judgment was not assailable on that ground. This principle is par-

ticularly applicable where constitutional matters are involved and the rule has always been that such questions must be raised at the earliest opportunity.

Since the decision of the Court of Appeals is fully supported on the ground that the constitutional question was not properly raised or preserved, it is wholly unnecessary for this Court to consider the case. Indeed, it is the accepted practice of this Court to decide cases on non-constitutional grounds whenever possible.

Peters v. *Hobby*, 349 U. S. 331, 99 L. ed. 1129, 75 S. Ct. 790 (1955).

Communist Party of the United States of America v. *Subversive Activities Control Board*, 351 U. S. 115, 100 L. ed. 1103, 76 S. Ct. 663 (1956).

Respondent suggests that this principle is especially applicable in determining whether the court should or should not exercise its discretionary jurisdiction in a given case, for the availability of a non-constitutional ground of decision clearly shows the lack of any "special" or "important" reason for granting certiorari as those terms are used in Rule 19 of the Rules of the Supreme Court of the United States.

Turning, for the sake of argument, to the merits of the constitutional question itself, Respondent submits that even if it had been properly raised and preserved, it is not such a question as requires a review by the Supreme Court of the United States in the exercise of its discretionary jurisdiction. The decision of the Court of Appeals for the Seventh Circuit is not in conflict with the decision of any other circuit. On the contrary, every one of the six other circuits which has considered this question has reached the same conclusion as did the Seventh Circuit in the instant case and in four of those cases this Court denied certiorari.

Byrne v. *Matczak*, 254 F. 2d 525, 528-529 (3rd Cir. 1958), certiorari denied, 358 U. S. 816, 79 S. Ct. 24, 3 L. ed. 58.

Franklin v. *Shelton*, 250 F. 2d 92, 99 (10th Cir. 1957), certiorari denied, 355 U. S. 959, 78 S. Ct. 544, 2 L. ed. 2d 533.

Guardian Fire Insurance Co. v. *Central Collision Co.*, 194 F. 851, 853 (5th Cir. 1912).

Liverpool & London & Globe Ins. Co. v. *N. & M. Friedman Co.*, 133 F. 713, 716 (6th Cir. 1904).

Walton v. *Wild Goose Mining & Trading Co.*, 123 F. 209, 221 (9th Cir. 1903), certiorari denied 194 U. S. 631, 24 S. Ct. 856, 48 L. ed. 1158.

Bratcher v. *U. S.*, 149 F. 2d, 742, 747 (4th Cir. 1945) Cert. denied, 325 U. S. 885, 65 S. Ct. 1580, 89 L. ed. 2000.

Even if Petitioner had made a timely objection to the separation of the jury, the cases cited above hold that he would not be entitled to a reversal because the Federal District Courts have the discretionary power to permit temporary separations even after the case has been submitted to the jury. The cases also hold that separation of the jury is not a ground for a reversal unless the party complaining shows that he was prejudiced by the separation. In the instant case Petitioner made and makes no claim that the separation resulted in any misconduct on the part of the jury to the prejudice of the Petitioner. Petitioner stands on the mere fact that the jury was separated. The record shows that the jury was admonished to speak to no one about the case while separated and to recommence deliberations only when all jurors had returned to the Courthouse and were reassembled. It is presumed that the jury followed these instructions in the absence of any showing to the contrary.

Neither is the decision of the Court of Appeals of the

Seventh Circuit in conflict with any applicable decision of this Court. On the contrary, the decision is entirely consistent with the holding of this Court in *Galloway* v. *United States*, 319 U. S. 372, 87 L. ed. 1458 (1943). Petitioner's sole argument is that the common law concept of trial by jury prohibited separation of the jury during deliberations and that this aspect of jury trial was carried over into and must forever remain a part of the Seventh Amendment. But this Court held in the *Galloway* case that:

> "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common law system of pleading or the specific rules of evidence then prevailing."

The decisions of the trial court and the Court of Appeals are also in complete accord with the law of the State of Indiana, the governing substantive law in this case. For more than 100 years it has been the public policy of the State of Indiana to permit the separation of civil and criminal juries in the discretion of the trial court.

Barlow v. *State*, 2 Blackford's Reports 114, 116 (1827).

Haynes v. *Thomas*, 7 Ind. 38, 39 (1855).

Acts of General Assembly of Indiana, 1852, Revised Statutes, Vol. 2, Page 113; Burns Ind. Stat. Anno., 1946 Repl. Vol. 2, Part 1, Section 2-2016.

This public policy should be given great weight. The purpose and intent of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938) was to insure that in all cases where a federal court is exercising jurisdiction because of diversity of citizenship, the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a state court. For this purpose abstractions re-

garding "substance" and "procedure" should be put aside.

Byrd v. *Blue Ridge Rural Electric Coop.*, U. S. 525, 550, 2 L. ed. 2d 953, 969-970, 78 S. Ct. 893 (1958).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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